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| In re Application of | : | |
| Jakusch et al. | : | |
| Application No. 09/856,416 | : | DECISION |
| PCT No.: PCT/US99/25781 | : | |
| Int. Filing Date: 02 November 1999 | : | ON |
| Priority Date: 19 November 1998 | : | |
| Atty. Docket No.: 54567USA1A.013 | : | PETITION |
| For: Non-Woven Adhesive Tape For The | : | |
| Manufacturing Of A Diaper... | : | |

This is in response to the "Petition To Revive Under 37 CFR § 1.137" filed on 11 December 2002, which is being treated as a petition to withdraw the holding of abandonment under 37 CFR 1.181.

BACKGROUND

This international application was filed on 02 November 1999 and claimed earliest priority of an application filed on 19 November 1998. A Demand electing the United States was filed prior to the elapse of 19 months from the priority date. Accordingly, the 30 month time period for paying the basic national fee in the United States expired at midnight on 19 May 2001.

On 18 May 2001, applicants filed *inter alia* the basic national fee.

On 27 June 2001, a Notification of Missing Requirements (Form PCT/DO/EO/909) was mailed to applicants, requiring the submission of an executed oath or declaration and a surcharge under 37 CFR 1.492(e).

On 22 November 2002, a Notice of Abandonment Under 37 CFR 1.53 (f) Or (g) was mailed to applicants, indicating that the application had become abandoned for failure to timely reply to the Notification of Missing Requirements.

On 11 December 2002, applicant filed the instant petition.

DISCUSSION

Petitioner alleges that the application became abandoned because "neither the Filing Receipt nor the Notice of Missing Parts was received by applicants." As explained in MPEP 711.03(c), and following *Delgar v. Schuyler*, 172 USPQ 513 (D.D.C. 1971), an adequate showing of non-receipt of papers mailed to applicant by the Office must include (1) a statement by the practitioner that the Office action was not received by the practitioner; (2) a statement attesting that a search of the file jacket and docket records indicates that the Office action was not received; and (3) a copy of the docket record where the non-received Office action would have been entered had it been received (the docket records must also be referenced in petitioner's statement). A review of the totality of evidence now of record establishes

that, within the practice under MPEP 711.03(c), petitioner has satisfied requirement (1), but has not satisfied requirements (2) and (3).

Regarding requirement (1), the petition includes an appropriate statement.

Regarding requirement (2), counsel refers to "Affidavits of Sandra R. Dickman and Cheryl L. Schmitz are also enclosed in support of this Request." The Affidavit of Sandra R. Dickman states in part that "According to my records, no Notice to File Missing Parts was ever received in our file 54567US013 (corresponding to U.S. Serial No. 09/856,416). Therefore, this docket item was never listed on the Attorney's docket." Meanwhile, the Affidavit of Cheryl L. Schmitz states in part that "According to our records, a Notice to File Missing Parts was never received corresponding to this application. The first communication from the Patent and Trademark Office with respect to this application was the Notice of Abandonment mailed November 22, 2002." However, the evidence of record lacks an explicit statement attesting that a *search of the file jacket and docket records* indicates that the Office action was not received. Rather, the affidavits of record merely refer to "records" which may or may not constitute the required search. Therefore, requirement (2) has not been satisfied.

Regarding requirement (3), the petition is accompanied by copies of a "Prosecution History" sheet and of a "prosecution file cover." These sheets do not satisfy the requirement for a "copy of the docket record where the non-received Office action would have been entered had it been received." The required docket record is a record enumerating applications for which replies were required on and around the due date for reply - that is, on and around 27 August 2001. Since applicants have not furnished such a record, requirement (3) has not been satisfied.

DECISION

For the reasons discussed *supra*, the petition is **DISMISSED**, without prejudice.

If reconsideration on the merits of this petition is desired, a proper response must be filed within **TWO (2) MONTHS** from the mail date of this decision. Any reconsideration request should include a cover letter entitled "Renewed Petition Under 37 CFR 1.181." No additional petition fee is required. Alternatively, applicants may elect to file a petition pursuant to 37 CFR 1.137(b) within the same two-month time period. Extensions of time may be obtained under 37 CFR 1.136(a).

Any further correspondence with respect to this matter should be addressed to the Assistant Commissioner for Patents, Box PCT, Washington, DC 20231, with the contents of the letter marked to the attention of the PCT Legal Office.



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